Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-28

INSTITUTE OF SCRAP IRON AND STEEL, INC., et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION,

Appellees,

and

LOUISVILLE AND NASHVILLE RAILROAD CO., et al.,

Intervenors.

On Appeal From The United States District Court For The District Of Columbia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants* appeal from the Memorandum-Order of the three-judge United States District Court for the Dis-

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* A list of the Appellants is attached hereto as Appendix "A".

trict of Columbia dismissing Appellants' complaint to set aside and enjoin an order of the Interstate Commerce Commission eliminating the statutory and common law duty of rail carriers to weigh shipments at or near point of origin and deliver to shippers a receipt showing the quantity of freight tendered to the railroad. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that substantial issues of great importance are presented.

OPINIONS BELOW

The decision of the Interstate Commerce Commission from which Appellants appealed to the District Court is reported at 341 I.C.C. 771. The July 9, 1973 Memorandum and Order of the District Court remanding the proceeding to the Commission is attached hereto as Appendix "B". The Report of the Commission Upon Further Consideration, (one Commissioner dissenting), dated September 19, 1974 and served September 27, 1974 is attached hereto as Appendix "C". The final Memorandum-Order of the District Court of March 17, 1975 is attached hereto as Appendix "D".

JURISDICTION

Appellants filed suit in the District Court to set aside an order of the Interstate Commerce Commission pursuant to 28 U.S.C. 1331, 1336, 1398, 2284 and 2321 through 2325 inclusive. The final Memorandum-Order of the District Court dismissing such suit was filed March 17, 1975. Notice of appeal to the Supreme Court was filed in the District Court on May 14, 1975.

The Supreme Court has jurisdiction to review the decision of the three-judge District Court by direct appeal

by virtue of Title 28, United States Code, Sections 1253 and 2101. The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Interstate Commerce Commission, et al.* v. *City of Jersey City, et al.*, 322 U.S. 503; *Alton Railroad Co.* v. *United States, et al.*, 287 U.S. 229; and *Baltimore & Ohio Railroad Co., et al.* v. *United States, et al.*, 298 U.S. 349.

STATUTES INVOLVED

The statutes involved herein, Sections 1 (5) and (6), 2, 3 (1) and 20 (11) of the Interstate Commerce Act, 49 U.S.C., and Section 10 (e) (B), 5 U.S.C. 706 (2) of the Administrative Procedure Act, are set forth in Appendix "E" attached hereto.

QUESTIONS PRESENTED

1. Does a railroad tariff provision that eliminates the duty and long-standing practice of the carriers to weigh shipments at or near the point of origin and furnish shippers a receipt showing the quantity of freight tendered by the shipper for carriage violate Sections 1 (5) and (6), 2, 3 (1) and 20 (11) of the Interstate Commerce Act as well as the common law?

2. Does a railroad tariff provision that eliminates the duty and long-standing practice of the carriers to weigh shipments at or near the point of origin transform an integral and historical part of the transportation service performed by the railroads into a newly created accessorial service for which the railroads may not charge without substantial evidence that an additional charge is justified?

3. Was the Commission's decision upholding the lawfulness of such tariff arbitrary, capricious, an abuse of discretion, not in accordance with law and unsupported by substantial evidence in violation of Section 10 (e) (B) of the Administrative Procedure Act, 5 U.S.C. 706 (2)?

STATEMENT OF THE CASE

This litigation is concerned with the lawfulness of a tariff eliminating the duty of rail carriers to weigh shipments at or near point of origin and furnish shippers with a receipt showing the quantity of goods tendered to the railroad. The specific tariff provision in question (attached hereto as Appendix "F") is Item 415 (Rule 4) of Freight Tariff S-215-K and was published by the Class I Railroads in Southern Territory that generally includes the area east of the Mississippi River and south of the Ohio and Potomac Rivers.

Appellant, Institute of Scrap Iron and Steel, Inc., is a national trade association representing more than 1,380 processors, brokers and shippers of iron and steel scrap, as well as industry suppliers. The other Appellants are iron and steel scrap processors and shippers located in Southern Territory. Iron and steel scrap is the major recyclable commodity moving by rail, accounting for well over half of the tonnage and revenue derived by the carriers from the movement of recyclables.

Intervenors (listed in Appendix "G" attached hereto) are major railroads in Southern Territory.

Rail shipments are weighed to ascertain the amount of goods tendered by shipper to carrier; to calculate freight charges; and to determine if cars are overloaded. Before the assailed tariff was published, scrap shipments were

weighed at point of origin or as near thereto as practicable and the weights were furnished to the shipper. The shipper paid the railroad the published freight rate for the movement which included weighing service. In the event of a loss in transit the shipper could enforce his claim since he had evidence of the quantity of scrap tendered to the railroad.

The assailed tariff eliminates origin weighing when the steel mill or foundry consignee has entered into a destination weight agreement with the carrier. In such cases the shipment is weighed only at destination and the shipper is unable to prove the amount of scrap tendered to the carrier in order to collect for a loss in transit unless he pays the railroad an extra charge for weighing at origin. Most scrap processors, being small businesses, cannot afford to purchase track scales in order to ascertain origin weights themselves. Where no weight agreement is in force at destination, the carriers still weigh shipments at or near the point of origin without extra charge.

A destination weight agreement is a contract between the consignee and the railroad that generally provides that the consignee will weigh all cars and furnish the weights to the carrier for billing of freight charges. The shipper is not a party to destination weight agreements nor is his consent to the arrangement requested.

On December 4, 1969, Appellants filed a Complaint with the Interstate Commerce Commission challenging the lawfulness of the carriers' elimination of origin weighing of scrap iron shipments. In such Complaint Appellants alleged numerous violations of the Interstate Commerce Act, including 49 U.S.C. 20 (11), dealing with the railroads' duty to issue a receipt to the shipper.

The proceeding was tried pursuant to the Commission's Modified Procedure. In November, 1970 the Administra-

tive Law Judge recommended in his Report and Order that the Complaint be dismissed.

The Commission in its Decision and Order served March 20, 1972 affirmed and adopted the Administrative Law Judge's Recommended Report and Order, 341 I.C.C. 771. Thereafter, the Commission denied Appellants' Petition for Reconsideration and Petition Seeking a Finding of General Transportation Importance.

Having exhausted all administrative remedies, Appellants filed suit on October 17, 1972 in the United States District Court for the District of Columbia to set aside and enjoin the Commission's decision. By Memorandum Order dated July 9, 1973, the District Court remanded the proceeding to the Commission for further consideration "for a statement of facts and reasons in the record supporting its decision of February 18, 1972."

Upon further consideration (one Commissioner dissenting), by its Report served September 27, 1972, the Commission reaffirmed its original decision favoring the carriers. The District Court by Memorandum Order of March 17, 1975 affirmed the Commission's holding and Appellants filed their Notice of Appeal to the Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

Probable jurisdiction should be noted for a full hearing of this appeal because a very basic, fundamental and pervasive issue of transportation law is at stake. A majority of the members of the Interstate Commerce Commission ruled that shippers are no longer entitled to a receipt from the common carrier showing the quantity of goods tenderd for carriage.

The basic premise of Appellants' position is that Section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11), and the common law require common carriers to weigh shipments at point of origin and furnish a receipt to the shipper showing the quantity of goods tendered. This is perhaps most clearly stated in the dissenting opinion of Commissioner O'Neal at page 14 of the Commission's Report Upon Further Consideration (Appendix "C"):

> "It is the obligation of the carrier to issue a receipt indicating what he has received. It is therefore not sufficient to state that the consignor has the option of paying for an origin inspection; the receipt is the carrier's responsibility."

While the instant case was pending at the administrative level, the Commission in a parallel proceeding recognized that a bill of lading is a "receipt for goods shipped" and that Section 20(11) makes common carriers virtual insurers against loss of property accepted for transportation. *Rules, Regulations, and Practices of Regulated Carriers With Respect to the Processing of Loss and Damage Claims*, 340 I.C.C. 515, 522, 584 (1972).

A "receipt" from an insurer that does not state quantity is of little or no value. Commissioner O'Neal stated: "A receipt issued based on the status of the shipment at point of delivery without any indication of its condition at point of origin is meaningless."

Under the common law, a railroad is more than an ordinary bailee for hire — it is an insurer against all risks except acts of God and the public enemy, *Acme Fast Freight* v. *Chicago, M. & St. P. & P. R. Co.*, 166 F. 2d 778 (1948).

The Supreme Court held that railroads cannot exempt themselves from this common law liability, *Railroad Com-*

pany v. *Lockwood,* 84 U.S. 357, 381 (1873). In *Missouri Pacific R. Co.* v. *Elmore & Stahl,* 377 U.S. 134 (1964), the Court held that one of the undisputed effects of Section 20(11) is to declare unlawful and void any rule, regulation or other limitation of any character whatsoever purporting to limit carrier liability. See also *Practices and Policies In The Settlement of Loss and Damage Claims on Grain and Grain Products,* 346 I.C.C. 33 (1974).

By eliminating origin weighing and the duty to issue a receipt showing the quantity of freight, thereby destroying the shipper's ability to collect for losses, the carriers are obviously seeking to exempt themselves from their common law and statutory liability and responsibility in violation of the aforecited rulings of this Court.

Prior to the instant decision the Commission had long ago established the rule that freight must be weighed at the point of origin or as near thereto as practicable. *In Re Weighing of Freight by Carrier,* 28 I.C.C. 736. In fact, shipments are still weighed at origin when the consignee has no destination weight agreement. Thus, the subject tariff is discriminatory in violation of Sections 2 and 3 of the Interstate Commerce Act (49 U.S.C., Sec. 2, 3). The consignor at point "A" shipping to a non-destination weight agreement receiver at point "B" receives an origin weighing without additional charge, while the consignor at point "A" shipping to a consignee at point "B" with a destination weight agreement now must pay an extra charge for origin weighing over and above the published freight ~~weight~~ RATE.

The decision appealed from thus violates the long-standing rule of the Interstate Commerce Commission that

> ". . . it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall reasonableness of the increased line-haul rate resulting therefrom." *Wichita Board of Trade* v. *U.S.,* 352 F. Supp. 365, 368 (D. Kansas) affirmed in part, reversed in part *sub nom, Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade,* 412 U.S. 800 (1973).

In the past the Commission has recognized that it is unlawful to require the party obligated to pay the freight charges to be bound by weights obtained at points so far distant that he has no practical means of observing the weighing process or requesting a reweighing. *Toberman, Mackey & Co.* v. *Southern Railway,* 102 I.C.C. 359 (1925).

Two points in the Commission's decision merit mention. It is contended that when a carload of scrap iron is lost enroute through derailment, past shipments can be averaged to compute the shipper's loss. This ignores the fact that derailments are rare. Far more common is a partial loss of five, ten or fifteen thousand pounds of scrap during carriage because of negligent handling, poor equipment, or theft. In this situation there is no way for the shipper to receive compensation for the loss without an origin weight. See Commissioner O'Neal's dissent (Appendix "C," p. 19a).

The sole judicial authority cited in support of the proposition that weighing need not be performed at origin is *Baird* v. *St. Louis, I.M.& S. Ry. Co.,* 41 F. 592 (1890) (E.D. Ark). However, *Baird* was decided before Section 20(11) was enacted as the Carmack Amendment, part of the Hepburn Act of July 29, 1906.

CONCLUSION

The Commission's approval of a tariff negating the carriers' long-standing common law and statutory duty to provide the shipper with a receipt showing the quantity of goods tendered for carriage amounts to a revolutionary usurpation of legislative and judicial authority by an administrative agency. The policy codified in Section 20 (11) of the Interstate Commerce Act was developed over hundreds of years of Anglo-American jurisprudence. This Court should not sustain the Commission's unilateral decision to absolve common carriers from liability without a full hearing. Thus, Appellants respectfully request that probable jurisdiction be noted.

Respectfully submitted,

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July, 1975.

APPENDIX A

APPELLANTS

Institute of Scrap Iron and Steel, Inc.

Acre Iron & Metal

Allied Scrap Iron & Metal Co.

Berman Bros., Inc.

Brenner Iron & Metal Co.

Central Metals Co.

Charleston Steel & Metal Co.

Cline & Bernheim

Culp Iron & Metal Co., Inc.

Denbo Wholesale Produce, Scrap Division

H. O. Forgy & Son, Inc., Scrap Metal Division

Georgia Paper Stock Co.

N. Goldberg Co., Inc.

M. Goldstein and Sons

L. Gordon Iron & Metal Co., Inc.

Industrial Scrap & Waste Co., Inc.

Jaffe-Wohl Iron & Metal Co.

M. Kimerling & Sons, Inc.

J. T. Knight of Atlanta, Inc.

Knox Metals Corp.

Levin Brothers, Inc.

Alfred Lichtenfels Co.

H. Lurey & Son, Inc.

Martinsville Iron & Steel Co., Inc.

L. Miller & Sons, Inc.

Montgomery Iron & Metal Co., Inc.

National Salvage Co.

F. Perlman & Co., Inc.

Piedmont Steel & Metal Corp.

Richelson Iron & Metal Co.

Schwartz & Son, Inc.

Bill Schwartz, Inc.

Siskin Steel & Supply Co., Inc.

Southern Converting Co., Inc.

Southern Iron & Metal Co.

Steelmet, Inc.

Steiner-Liff Iron & Metal Co., Div of Steiner-Liff Industries

Charles Temerson & Sons

Union City Iron & Metal Co.

United Scrap Processors, Inc.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INSTITUTE OF SCRAP IRON
AND STEEL, INC., et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Defendants.

Civil Action No. 2090-72.

MEMORANDUM AND ORDER

The plaintiffs, the Institute of Scrap Iron and Steel, and individual Institute members found in the Southern Freight Association Territory[1] (herein after Southern Territory) ask this three-judge court to set aside an order of the Interstate Commerce Commission (hereinafter the

[1] The Territory includes points in the states of Alabama, Florida, Georgia, Indiana (Evansville), Kentucky, Louisiana (East of the Mississippi River), Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

I.C.C.) pursuant to 28 U.S.C. 1331, 1336, 1398, 2284 and 2321 through 2325 inclusive.[2]

In the proceedings before the I.C.C., plaintiffs challenged Item 415 (Rule 4) of Freight Tariff S-215-K which establishes rules and charges governing the weighing and reweighing of carload freight in the Southern Territory. They alleged that the Item is violative of 49 U.S.C. 2 and 3 (1) in that it is discriminatory; of 49 U.S.C. 1 (4), (5) and (6) in that it is unreasonable, unjust and inequitable; of 49 U.S.C. 20 (11) in that it violates the common carrier liability provisions of that section; and of 49 U.S.C. 6 (3) and (6) in that the affected carriers failed to publish a list of those consignees with whom they had destination weight agreements. The Administrative Law Judge ruled against plaintiffs on November 4, 1971 and his decision was upheld by the I.C.C. Review Board No. 4 on February 18, 1972 in *Institute of Scrap Iron & Steel, Inc. et al.* v. *Aberdeen & Rockfish Railroad Company*, 341 I.C.C. 771.

The challenged Item 415 reads as follows:

> "Except where consignee's weights are accepted under the terms of weight agreements as provided in Item 520, Rule 10 carload freight should be weighed at point of origin, or as near thereto as practicable. When the consignee's weight agreement weights are used for the assessment of freight charges, whether collect or prepaid, the charge for weighing will apply when the car is weighed at the request of the shipper."

The practical effect of this provision is that the carrier railroads, which had previously weighed open cars containing shipments of scrap metal for the purpose of computing freight charges at the point of origin, or as near

[2] Intervenor defendants included the Louisville & Nashville Railroad Co,. the Illinois Central Gulf Railroad Co., The Southern Railway System, and the Seaboard Coast Line Railroad Co.

thereto as practicable, without charge to shippers over and above the line-haul rate, would now determine these charges based on weighing done at destination by consignees with whom they had "destination weight agreements."[3] Any origin weighing which plaintiffs contend they need in order to effectively enforce their rights against the carriers for loss or pilferage enroute, would be performed only for a charge additional to the line-haul rate.

Without addressing the merits of plaintiffs' contention that the new practice is discriminatory, unreasonable and in derogation of the common law duties of the carriers, the Court is preliminary of the view that by permitting the new tariff to stand, the I.C.C. has in effect converted origin weighing, a service previously performed as part of the line-haul rate, into an "accessorial" service when destination weight agreements are employed.[4]

It is a longstanding rule of the I.C.C. that ". . . it it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall reasonableness of the increased line-haul rate resulting therefrom." *Wichita*

[3] It is evident that sound commercial practice would dictate that consignees always weigh shipments of scrap before accepting them. However, the record is not clear whether the weight agreements between carriers and consignees provided for payments from carrier to consignee for performing this service. Plaintiffs alleged that no payment was made and intervenor defendants conceded that "the *quid pro quo*" for the service may be merely the assumption of the duty of supervising weighing procedures. On remand the Commission may see fit to explore this question.

[4] This change affects only the Southern Territory. Elsewhere, it appears that destination weight agreements for determination of freight charges for open car carriage of iron scrap are still not generally employed. The Commission record is silent as to reasons why destination weighing his become the accepted practice in the Southern Territory and not elsewhere.

Board of Trade v. *United States,* 352 F.Supp 365 (D. Kansas 1972) affirmed in part, reversed in part *sub nom, Atchison Topeka and Sante Fe Railway Company* v. *Wichita Board of Trade,* 412 U.S. 800 (June 18, 1973).[5] But although it appears that the railroads affected by Tariff S-215-K will now charge some shippers separately for the same origin weighing they once performed without charge, a distinct departure from a longstanding industry practice long approved by the I.C.C., the record remains silent as to the policy decisions which influenced the Commission to uphold this departure. The decision merely says:

> The complainants have no proved entitlement to any of the requested relief. The complaint should be dismissed. The objective of the complainants appears to be to secure an origin weighing at no cost, despite authorized destination weighing provided as part of the line-haul rate. The requested origin weight would serve the shippers purpose other than to determine the freight charge. If such service is desired, it should not be at the carrier's cost. Institute of Scrap Iron & Steel v. Aberdeen & Rockfish Railroad, 341 I.C.C. 771, 776.

There may be wisdom in this conclusory language adopted by the I.C.C. and if the conclusions of the Commission have a rational basis, it is not for the Court to quarrel with them. Line-haul rates fall within administrative, not judicial, expertise.

However, while the Court must not question any rational policy developed by the Commission within the bounds of its Congressional mandate, it must require that there be some articulation of that policy. The substance of the decision below is merely that plaintiffs have failed to

[5] See also, *Secretary of Agriculture* v. *United States,* 347 U.S. 645 (1945). Transit Charges, Southern Territory 332 I.C.C. 664.

prove a Commission-approved change in weighing procedures unreasonable. This is hardly a statement of reasons eludicating the rationale for a change in long-standing policy, and such a statement is needed before the Court can go further. The reasons are for the Commission to articulate; the Court will not search the record for them.[6]

The conclusion of the Court, therefore is that this case should be remanded to the I.C.C. for a statement of facts and reasons in the record supporting its decision of February 18, 1972.

It is so ORDERED.

/s/ ROGER ROBB
Circuit Judge

/s/ HOWARD F. CORCORAN
District Judge

/s/ Oliver Gasch
District Judge

Dated: July 9, 1973

[6] See, *Atchison Topeka & Santa Fe Ry.* v. *United States,* 295 U.S. 193, 201-202 (1936); *WAIT Radio* v. *FCC,* 418 F.2d 1153 (CADC 1969).

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. 35200

INSTITUTE OF SCRAP IRON & STEEL, INC., et al.

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, et al.

Decided September 19, 1974.

Upon further reconsideration, tariff rule requiring acceptance by consignor of consignee's weights for assessment of freight charges, under terms of weight agreements between consignee and defendant railroads, found not to be unjust and unreasonable or otherwise unlawful. Findings in prior report, 341 I.C.C. 771, affirmed, and complaint dismissed.

Appearances as shown in prior report.

REPORT OF THE COMMISSION UPON FURTHER CONSIDERATION BY THE COMMISSION:

In the prior report, 341 I.C.C. 771, decided February 18, 1972, the Commission, Review Board Number 4, found just and reasonable and otherwise lawful, the tariff rule requiring acceptance by consignor of consignee's weights for assessment of freight charges, under terms of weight agreements between consignee and defendant railroads.

Division 2 of the Commission, by order dated August 1, 1972, denied complainants' petition for reconsideration and by order dated September 5, 1972, the Commission denied complainants' petition seeking a finding that an issue of general transportation importance is involved in this proceeding. Following those denials, complainants instituted a civil action in the United States District Court for the District of Columbia. The U.S. District Court by memorandum and order entered on July 9, 1973, in *INSTITUTE OF SCRAP IRON AND STEEL, INC.*, et al. v. *UNITED STATES OF AMERICA INTERSTATE COMMERCE COMMISSION*, Civil Action No. 2090-72, remanded the case to the Commission "for a statement of facts and reasons in the record supporting its decision of February 18, 1972;" whereupon this proceeding was reopened for further consideration on the present record by the Commission's order of August 23, 1973.

The facts of record are as stated in the prior report and will be restated herein only where necessary for clarity. Contentions and requested findings not specifically discussed in this report nor reflected in our conclusions or findings have been considered and found not justified.

By complaint filed December 4, 1969, the Institute of Scrap Iron & Steel, Inc., on behalf of 39 specified members located in southern territory seeks relief from tariff Item 415 of Freight tariff S-215-J, I.C.C. 865 which establishes rules and charges governing the weighing and reweighing of carload freight in southern territory. That item provides the following:

> "Except where consignee's weights are accepted under the terms of weight agreements as provided in Item 520, Rule 10 carload freight should be weighed at point of origin, or as near thereto as practicable. When the consignee's weight agreement weights are

used for the assessment of freight charges, whether collect or prepaid, the charge for weighing will apply when the car is weighed at the request of the shipper."

Complaints allege that Item 415 is violative of 49 U.S.C. 1 (4), (5), and (6) in that it is unreasonable, unjust and inequitable; of 49 U.S.C. 20 (11) in that it violates the common carrier liability provisions of that section; and of 49 U.S.C. 6 (3) and (6) in that the affected carriers failed to publish a list of those consignees with whom they had destination weight agreements.

In addition to alleging violations of the Interstate Commerce Act, complainants contend that the assailed item disregards trade customs and practices, and that the practice of ascertaining the weight of the car at origin has been historically followed by the railroads since the implementation of railroad scales. They point out that prior to September 4, 1969, the effective date of the involved tariff, the railroads weighed all shipments of scrap at or near point of origin.

By report and order dated November 18, 1970, the Administrative Law Judge held that item was not shown by complainants to be unlawful. He restricted his findings to alleged violations of sections 1 and 2 of the Interstate Commerce Act, and concluded that the assailed item was not unjust and unreasonable nor discriminatory on shipments of scrap metal moving to consumers who maintain track scales. The report held that whether movements are to steel plants having track scales and weight agreements or to plants without track scales, the shippers pay the same charges for like or contemporaneous services, since in each instance the shipper is not charged for the weighing to determine the applicable freight charge.

In remanding the case to the Commission, the District Court did not reach the merits of complainants' contentions with respect to the assailed item. The court however, expressed the view that "by permitting the new tariff to stand, the I.C.C. has in effect converted origin weighing, a service previously performed as part of the line-haul rate, into an accessorial service when destination weight agreements are employed." It then noted the "longstanding rule of the I.C.C. that . . . it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall reasonableness of the increased line-haul rate resulting therefrom." Based on the foregoing interpretation of the effect of the involved tariff, the court concluded that while the Commission's determination resulted in "a distinct departure from a long standing industry practice long approved by the I.C.C., the record remains silent as to the policy decisions which influenced the Commission to uphold this departure." The District Court then remanded the proceeding to the Commission for an articulation of the facts and reasons in the record which support the initial decision.

DISCUSSION AND CONCLUSIONS

There is no dispute here as to the basic facts. Defendant railroads which had previously weighed open-car shipments of scrap metal for the purpose of computing freight charges, at the point of origin, or as near thereto as practicable, without charge to shippers over and above the line-haul rate, now determine these charges based on weighing done at destination by the consignee with whom they have "destination weight agreements." In such circumstances, any origin weighing requested by shippers would be performed only for a charge additional to the

line-haul rate. Therefore, the primary issue to be resolved on remand is whether the publication of Item 415, as the District Court found, resulted in a distinct departure from longstanding industry practices with respect to scrap metal and if so, whether the Commission decision in the prior report was justified on the basis of the evidence of record.

Complainants allege that the weighing at or near the point of origin was an integral part of the transportation service and the cost thereof was included in the line-haul rate. These weights were used as a basis for calculating freight charges, to determine if cars were overloaded, and to ascertain the amount of lading delivered to the carrier at point of origin. Defendant railroads dispute complainants' contention that the weighing service was intended for any purpose other than the determination of proper freight charges and deny that this weighing service was restricted to a point at or near origin.

While the Commission has on occasion said that shipments ordinarily are weighed at or near the point of origin to determine freight charges, *Weighing of Freight by Carriers,* In re 28 I.C.C. 7, there is nothing in the Interstate Commerce Act which requires a railroad to weigh a shipment at a particular time or in a particular way. Nor is there any requirement that the railroads are obligated to provide a weighing service as part of the line-haul rate other than for the purpose of computing freight charges. As the Commission said in *Anaconda Copper Mining Co. Terminal Service,* 264 I.C.C. 103; 266 I.C.C. 387, 391:

> "It is of course, the duty of carriers to weigh shipments to determine freight charges. This is ordinarily done at or near the point of origin, but where cars are not so weighed and it is impracticable to do so or is more convenient and economical for the carrier to weigh them at destination, it may do so without assessing a charge therefor. The carrier, however, is under no legal obligation to weigh or reweigh cars before or after unloading for the industry's convenience."

The tariff item at issue has resulted in no diminution of the railroads' duty with respect to weighing to determine freight charges. When a destination weight agreement is in effect the railroads are still performing the weighing service as part of the line-haul rate although they are performing this service at destination rather than at or near origin. Such a practice of weighing at destination is consistent with Commission policy with respect to weighing to determine freight charges as outlined in the *Anaconda* case, *supra.* Defendants point out that it is more convenient and economical to weigh shipments of scrap at destination when a destination weight agreement is in effect. Weighing at or near origin requires that the car be switched out of normal classification tracks. According to defendants, track scales are not only expensive to install, but when installed are usually located away from classification tracks, and consequently there is an unavoidable delay every time a car has to be weighed at origin. Defendants further contend that this practice of weighing at destination expedites the movement of cars and therefore improves car supply. The railroads also point out that where a destination weight agreement is in effect, the commercial transaction between buyer and seller is based on the weights at destination. Under these circumstances, the carriers say it is most economical to use these destination weights in computing freight charges.

From the above discussion, it is clear that with respect to transportation service rendered as part of the line-haul rate, the railroads' only duty to weigh the freight is for

the purpose of determining the proper freight charges. While this weighing normally is performed at or near point of origin, it can be performed at destination when there is a destination weight agreement in effect. The assailed item is, therefore, fully consistent with past railroad weighing practices.

However, complainants allege that weighing service in the case of scrap iron and steel does not conform to the general pattern and that the weighing of scrap is also performed for the benefit of the shipper to determine the amount of lading delivered at point of origin. If this allegation were correct, and past railroad practice had been to include weighing at origin for the shipper's benefit, then such weighing service could properly be held to have been performed as an accessorial service. And, had such an accessorial service been offered, no separate charge could be approved for that service unless the rail carriers could support that action with substantial evidence. While the District Court cited as a longstanding rule of the Commission that "it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall reasonableness of the increased line-haul rate resulting therefrom. . .", *Wichita Board of Trade* v. *United States,* 352 F. Supp. 365, there is no evidence of record to indicate that the railroads had ever held themselves out to perform a weighing service at origin *for the benefit of the shipper* as part of the line-haul rate. Any benefits which shippers derived from origin weighing were merely incidental and fortuitous, and were not the result of a conscious railroad policy to provide additional shipper services as part of the line-haul rate.

Since no trade custom requires railroads to weight at or near origin to determine freight charges, and there is no

evidence that defendants were performing origin weighing as an accessorial service (i.e., a service for the shipper's benefit other than to determine freight charges) prior to 1969 when the assailed item became effective, we have looked into the recent history of the weighing tariff to determine whether prior to that date it had required the railroads to weigh shipments of scrap at or near point of origin. Our research into the tariff provision at issue fails to establish any precedent which would require origin weighing. The first sentence of the involved tariff item was published originally in tariff S-215-I of the SFTB Weighing and Reweighing Rules effective on May 12, 1966. This sentence provides:

> "Except where consignee's weights are accepted under the terms of weight agreements as provided in Item 520, Rule 10, carload freight should be weighed at point of origin or as near thereto as practicable."

Item 520 and Rule 10 are one and the same tariff provision, and both provide for acceptance of either consignor's or consignee's weights when properly ascertained and made under proper supervision. Thus, since 1966, the weighing tariff of which Item 415 is a part, has continuously provided for use of the consignee's weights, and in such instances the tariff further provided that any request for weighing by the consignor, in addition to weighing done to determine freight charges, would constitute a request for reweighing for which the carriers must receive compensation.

Moreover, when the second sentence of the present tariff item was added to the previous tariff item it was preceded by a triangle symbol, which is explained as meaning a change in wording which results in neither increases nor reductions in charges. This additional sentence makes

explicit what was implicit under the provisions of the first sentence of Item 415, that an additional charge would be assessed if weighing service was performed other than for the purpose of computing proper freight charges. Thus the assailed item is consistent with the previous edition of the weighing tariff and does not constitute a distinct departure from past weighing tariffs.

As previously noted, the District Court was of the view that under Item 415 as originally published in Tariff S-215-I the consignor enjoyed an accessorial weighing service without charge as part of the line-haul rate, and that when the second sentence was added to the item, that eliminated an accessorial service. However, as noted above, the consignor since 1966 has had to pay for a weighing when it was for its own purposes. Thus, when the second sentence was added, it did not deprive the consignor of any service guaranteed by the tariff, but merely clarified the language of the tariff to reaffirm that a request for a weighing, other than the weighing by or for the railroad to determine freight charges, would be subject to the weighing charge published in the tariff.

From the foregoing, it can be seen that the assailed item does not represent a change in a longstanding "policy." The defendant railroads, for the reasons outlined above, simply have decided to exercise an alternative provision in their weighing tariff which is wholly consistent with Commission policy with respect to weighing to determine freight charges.

A further argument by the complainants, which was not discussed in the prior report, is their contention that this alternative provision relieves the carriers of their responsibility with respect to loss and damage claims. Complainants maintain that a shipper who does not have an origin weight is completely without recourse if there is a loss in

transit or a question as to the weight of the contents. Therefore, complainants allege that the questioned item is in violation of section 20 (11) because it operates to extinguish the common law and statutory responsibility of the carrier for losses in transit. More specifically, they contend that under Item 415, the bill of lading need not include an origin weight, making it impossible to establish that there have been losses in transit. Complainants also maintain that the Item 415 "sweeps away" the carrier's common law duty of issuing a receipt as to quantity.

Underlying these contentions is the assumption that a proper bill of lading must include the weight of the shipment. There is, however, no historical precedent requiring that shipments must be weighed at origin in order to determine freight charges, or that the actual weight must be inserted in the bill of lading. As the Court said in *Baird* v. *St. Louis, I.M.&S. Ry. Co.,* 41 F. 592, 594:

> "Bills of lading are frequently issued before the weight of the freight is known. It is not necessary to the issuance of a bill of lading that it should be known."

Furthermore, there is no evidence to suggest that the present item subverts a shipper's ability to settle its loss and damage claims. As the railroad defendants point out, present practice provides that when there is no origin weight and a car is derailed en route, claims are settled by averaging prior shipments of the involved commodity made by the shipper in similar equipment and the average so computed is used for settlement of the claim. Moreover, there is nothing in the tariff at issue to prevent shippers who suspect that there may be losses in transit from receiving a weighing at or near point of origin. When the carrier has entered into a destination weight agreement with a consignee, however, the railroad provides its line-haul

weighing service at destination and shipper's request for origin weighing in this instance will constitute a request for reweighing for which compensation must be paid. Such a policy is consistent with Commission policy which holds that if the weighing service is performed for the benefit of the shipper only, the carriers are required to collect a charge. *American Smelting & Refining Co. Terminal Services,* 294 I.C.C. 745, 749.

In light of the foregoing, it is clear that the complainants have failed to establish that the railroads' weighing rule (Item 415) is unjust and unreasonable or unlawful in any respect. Destination weight agreements have been employed by the railroads for more than 60 years for various commodities and there is no compelling evidence of record to indicate why such weighing procedures may not be used in the transportation of scrap iron and steel.

Upon further consideration, we find that the involved tariff rule, requiring the acceptance by consignor of consignee's weights for assessment of freight charges, under terms of weight agreements between consignee and defendant railroads, not to be unjust and unreasonable, and not in violation of any part of the Interstate Commerce Act.

We further find that the assailed tariff item is not a departure from past trade customs and practices with respect to the weighing of freight to determine freight charges and that Item 415 is consistent with previous publications of the Southern Territory Weighing Tariff.[1]

[1] With respect to the court's inquiry in its footnote 4, as to why the "Commission record it silent as to reasons why destination weighing has become the accepted practice in the southern territory and not elsewhere", it should be noted that nothing in the act requires that provisions in tariffs published in different sections of the country be identical in all respects. Since circumstances and conditions attendant on movements in different territories are not identical, it is not uncommon for tariffs in different territories to offer differing services in connection with the line-haul rates on shipments of like commodities. Moreover, we take official notice of the fact that in other territories tariffs *are* published that provide for the acceptance of destination weighing agreements. (See, e.g. the currently effective TEA-ER Weighing and Reweighing Tariff 790-A, I.C.C. C-843, Item 690 and Western Trunk Line Committee Weighing or Reweighing Tariff 335-K, jointly with other agents, I.C.C. A-4865, Item 310).

And we further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER O'NEAL, dissenting:

The complaints herein have argued, among other contentions, that the carrier's statutory obligation to issue a receipt under Section 20(11) of the Act, coupled with their liability for loss and damage, require that shipments of scrap be weighed at point of origin. The section provides as follows:

> "That any common carrier, railroad or transportation company subject to the provisions of this part receiving property for transportation . . . shall issue a receipt or bill of lading therefore, and shall be liable for the lawful holder thereof for any loss, damage, or injury to such property caused by it . . ."

The purpose of the receipt is to acknowledge just what the carrier received at point of origin; any discrepancy between the shipment at point of origin and at point of delivery is the liability of the carrier. A receipt issued based on the status of the shipment at point of delivery, without any indication of its condition at point of origin, is meaningless. While a weighing may not be necessary to determine exactly what the shipper tendered and the carrier received with respect to some commodities, it certainly

seems necessary with respect to scrap. The commodity cannot be inventoried by unit count, and it cannot be measured on the basis of volume. Therefore, although origin weighing may be unnecessary to the issuance of a receipt for some commodities, it seems imperative with respect to scrap.

It is the obligation of the carrier to issue a receipt indicating what he has received. It is therefore not sufficient to state that the consignor has the option of paying for an origin inspection; the receipt is the carriers' responsibility.

The report cites an 1890 case, *Baird* v. *St. Louis, I. M. & S. Ry. Co.,* 41 F. 592, for the proposition that it is not necessary to the issuance of a bill of lading that the weight of a shipment be known. However, that case was decided before Section 20(11) was enacted as the Carmack amendment, part of Hepburn Act of June 29, 1906. The imposition of a statutory requirement to issue a receipt would seem to supersede any interpretation of the terms of a bill of lading, the form and terms of which was controlled only by the parties.

Although as the report notes, an average weight may be used to compensate the shipper when an entire shipment is lost, as in a derailment, this sort of approximate measure is not sufficient to disclose the extent of the carrier's liability for partial losses. Without a bill of lading indicating how much scrap per car was tendered by the shipper and received by the carrier at origin, there is no way of determining (absent such an obvious incident as a derailment) whether a loss even took place. Relevant to this, I would like to call attention to the Commission's proposed rule in Ex Parte No. 263 (Sub-No. 2), *In Re Net Weights for Determining Losses,* which reads as follows:

Section 1005.7 Weight as a measure of loss.

Where weight is used as a measure of loss, the settlement of claims shall be used upon a comparison of net weights at origin and destination.

It is ordered, That the findings of the prior report be, and they are hereby, affirmed, and the complaint be, and it is hereby dismissed.

ROBERT L. OSWALD

(SEAL) Secretary

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2090-72.

INSTITUTE OF SCRAP IRON
AND STEEL, INC., et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,
Defendants.

MEMORANDUM-ORDER

This action involves a challenge by plaintiffs to Item 415 (Rule 4) of Freight Tariff S-215-K of the Interstate Commerce Commission which establishes rules and charges governing the weighing and reweighing of carload freight in the Southern Territory. The effect of Item 415 is that the carrier railroads, which had previously weighed open cars containing shipments of scrap metal for the purpose of computing freight charges at the point of origin, or as near thereto as practicable, without charge to shippers over and above the line-haul rate, if so requested by the shipper, would now determine these charges based on weighing done at destination. In short, the shipper is still entitled to one

free weighing but the weighing point is to be determined by the railroad. Any origin weighing which plaintiffs contend they need in order to effectively enforce their rights against the carriers for loss or pilferage enroute would be performed only for a charge additional to the line-haul rate.

By report and order dated November 18, 1970, the Administrative Law Judge held that Item 415 was not unlawful and his decision was upheld by the I.C.C. Review Board Number 4 on February 18, 1972, in *Institute of Scrap Iron & Steel, Inc., et al.* v. *Aberdeen & Rockfish Railroad Company,* 341 I.SC.C. 771. Plaintiffs then brought this suit to challenge the Commission's decision.

On July 9, 1973, this three-judge Court remanded this case to the I.C.C. "for a statement of facts and reasons in the record supporting its decision of February 18, 1972,"[1] because the Commission had affirmed the Administrative Law Judge without explaining the reasons that lay behind what this Court perceived to be a change in long-standing policy of the I.C.C.. We noted, however, that "if the conclusions of the Commission have a rational basis, it is not for the Court to quarrel with them."[2]

This standard of review was recently spelled out in another case involving the I.C.C., *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* — U.S. — (December 23, 1974) :

> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . Al-

[1] Memorandum and Order of July 9, 1973, at 5.

[2] *Id.* at 4.

> though this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the ageny" The agency must articulate a "rational connection between the facts found and the choice made." While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.[3] (Citations omitted.)

On October 22, 1974, the I.C.C. filed with the Court a "Report of the Commission upon Further Consideration" issued September 19, 1974, in which, pursuant to the instructions of this Court, the I.C.C., having reconsidered the case, affirmed its prior report and explained the reasons for its decision.

In this Report the Commission explained that the change was made because

> it is more convenient and economical to weigh shipments of scrap at destination when a destination weight agreement is in effect. Weighing at or near origin requires that the car be switched out of normal classification tracks. According to [the railroads], track scales are not only expensive to install, but when installed are usually located away from classification tracks, and consequently there is an unavoidable delay every time a car has to be weighed at origin.[4]

In response to this Court's question of whether the I.C.C. had changed a long-standing policy of origin weighing as part of the line-haul rate into an "accessorial" service when destination weight agreements are employed,[5] the Report noted, *inter alia*, that the obligation of the railroads to provide a weighing service as part of the line-haul rate is *only* for the purpose of computing freight charges;[6] that there is "no evidence of record to indicate that the railroads had *ever* held themeslves out to perform weighing service at origin for the benefit of the shipper as part of the line-haul rate;"[7] that "no trade custom *requires* railroads to weigh at or near origin to determine freight charges;"[8] and that "there is no evidence that [railroads] were performing origin weighing as an accessorial service (i.e., a service for the shipper's benefit other than to determine freight charges) prior to 1969 . . . ."[9] (Emphasis added). Therefore, there has been no change of long-standing "policy." Instead, a practice from which shippers derived incidental and fortuitous benefits has been changed.

Plaintiffs have filed Objections to the Report, and the Federal defendants and defendant-intervenor railroads have filed Replies to the plaintiffs' Objections. But upon consideration of the Report and the standard of review stated in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*, cited above,[10] it is by the Court this ..... day of March 1975,

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[3] 43 U.S.L.W. at 4092-93.

[4] Slip Opinion "Report of the Commission Upon Further Consideration" at 6-7.

[5] Memorandum and Order of July 9, 1973, at 3.

[6] Slip Opinion at 6, citing *Anaconda Copper Mining Co. Terminal Service*, 264 I.C.C. 103, 266 I.C.C. 387.

[7] Slip Opinion at 8.

[8] *Id.*

[9] *Id.*

[10] At 2-3.

ORDERED that the September 19, 1974, decision of the Interstate Commerce Commission in *Institute of Scrap Iron & Steel, et al.* v. *Aberdeen & Rockfish Railroad Company, et al.*, be and it is hereby, affirmed; and it is further

ORDERED that the Complaint in this case be, and it is hereby dismissed.

/s/ ROGER ROBB
United States Court of Appeals,
District of Columbia Circuit

/s/ HOWARD F. CORCORAN
United States District Court for
the District of Columbia

/s/ OLIVER GASCH
United States District Court for
the District of Columbia

APPENDIX E

STATUTES

49 U.S.C. § 1, par. (5). Just and reasonable charges. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

49 U.S.C. § 1, par. (6). Classification of property for transportation; regulations and practices. It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marketing, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

49 U.S.C. § 2. Special rates and rebates prohibited

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, that it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

49 U.S.C. § 3, par. (1). Undue preferences or prejudices prohibited. It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U.S.C. § 20, par. (11). Liability of initial and delivering carrier for loss; limitation of liability; notice and

filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose lines such property may pass within the United

States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided,* That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be

filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the lia-

bility imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

49 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX F

Item 415 (Rule 4), Freight Tariff S-215-K

"Except where consignee's weights are accepted under the terms of weight agreements as provided in Iitem 520, Rule 10 carload freight should be weighed at point of origin, or as near thereto as practicable. When the consignee's weight agreement weights are used for the assessment of freight charges, whether collect or prepaid, the charge for weighing will apply when the car is weighed at the request of the shipper."

APPENDIX G

Intervenors

Illinois Central Gulf Railroad Co.
Southern Railway System
Seaboard Coastline Railroad Co.
Louisville and Nashville Railroad Co.

AUG 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-28

INSTITUTE OF SCRAP IRON AND STEEL, INC., Et Al., - - - - - - - - Appellants,

versus

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, Et Al., - - - - - - - - - Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLEES' MOTION TO AFFIRM

(See inside cover for list of attorneys)

Due Date: August 4, 1975

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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IN THE

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October Term, 1975

No. 75-28

INSTITUTE OF SCRAP IRON AND STEEL, INC., et al., - - - - - - - *Appellants,*

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, et al., - - - - - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLEES' MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Railroad Appellees move that the judgment of the district court be affirmed on the grounds that the questions presented are so unsubstantial as not to warrant further argument.

This is a direct appeal from a Memorandum-Order of a Three-Judge United States District Court for the District of Columbia, filed March 17, 1975. By that

Order the Court unanimously affirmed the September 19, 1974, Decision of the Interstate Commerce Commission in *Institute of Scrap Iron and Steel, et al.* v. *Aberdeen and Rockfish Railroad Company, et al.* and dismissed Appellants' complaint attacking the Commission decision. By its September 19, 1974, Report Upon Further Consideration, the Commission upheld as not unjust and unreasonable a tariff rule requiring the acceptance by a consignor of consignee's weights for the assessment of freight charges. The Commission further held that the tariff item in question is not a departure from past trade customs and practices with respect to the weighing of freight to determine freight charges.

OPINIONS BELOW

The initial decision of which Appellant sought judicial review below is *Institute of Scrap Iron and Steel, Inc., et al.* v. *Aberdeen & R.R., et al.*, 341 I.C.C. 771 (1972). The July 9, 1973, Memorandum—Order of the District Court remanding the proceedings to the Commission for a statement of facts and reasons in support of the Commission's decision is attached to Appellants' Jurisdictional Statement as Appendix B. The report of the Commission upon further consideration, dated December 19, 1974, is attached to Appellants' Jurisdictional Statement as Appendix C. The Memorandum-Order of the District Court, dated March 17, 1975, is attached to Appellants' Jurisdictional Statement as Exhibit D.

QUESTION PRESENTED

Whether the District Court erred in affirming the Commission's decision below and dismissing Appellants' complaint.

PROCEEDINGS BELOW

This litigation had its inception nearly six years ago by the filing with the Commission, in December, 1969, by Appellants herein of a complaint attacking the provisions of a tariff item, insofar as it affects the movement of scrap iron and steel transported by railroads subject to Part 1 of the Interstate Commerce Act operating within or to and from Southern Freight Territory. The item in question is Item 415 (Rule 4) of Freight Tariff S-215-K and became effective September 4, 1969. The item is set out in full as Appendix F to Appellants' Jurisdictional Statement.

Basically, Item 415 provides that when there is in effect a destination weight agreement between the delivering carrier and the consignee, the weight of the lading determined by the consignee's weight will be used for the assessment of freight charges. If the shipper requests that the car be weighed in addition to the weight determined by the consignee pursuant to the weight agreement, a charge will be made for the additional weight requested by the shipper. Appellants thus no longer received the benefit of a "free" weigh which they could use to support a claim for loss and damage.

The complaint was assigned to an administrative law judge for the taking of evidence under the commission's Modified Procedure and the issuance of an Initial Decision. The law judge held that the item in question had not been shown to be unlawful, concluding that it was neither unjust nor unreasonable nor discriminatory on shipments of scrap metal moving to consumers who maintain track scales.

Appellants filed exceptions to the Administrative Law Judge's Initial Decision. The Commission's Review Board No. 4 on February 19, 1972, dismissed Appellants' complaint. Appellants' petition for reconsideration of the decision of the Review Board was denied by Division Two of the Commission by an order dated August 1, 1972. Appellants then petitioned the Commission for a finding that an issue of general transportation importance was involved in this proceeding. This petition was denied by the Commission by order dated September 5, 1972.

Appellants then filed the court action which is the subject of this statutory appeal. The complaint was filed in October, 1972, in the United States District Court for the District of Columbia and a three-judge court was convened in accordance with the terms of the statute. The three-judge court determined that a statement of the reasons elucidating the rationale for the Commission's decision was necessary before the court could proceed to consider the matter on its merits and remanded the case to the Commission for a statement of facts and reasons in the record supporting its decision of February 18, 1972.

The matter was further considered by the entire Commission in accordance with the court's remand, and on September 27, 1974, the Commission issued its decision articulating the rationale for its prior decision and affirming the result reached in its prior report.

Appellants filed objections to the Commission's report and replies were filed by the United States, the Commission and by appellee railroads. On consideration of the Commission's report upon further consideration, the lower court, noting that its scope of review is a narrow one, affirmed the Commission's decision and ordered that the complaint be dismissed.

THE QUESTIONS RAISED ARE UNSUBSTANTIAL

In their complaint to the Commission, as well as their complaint to the district court, Appellants urged that the tariff item in question was violative of numerous sections of the Interstate Commerce Act, including Section 20(11) and the common law applicable to common carriers. In addition to Section 20(11), other sections of the Act are referred to in Appellants' Jurisdictional Statement under questions presented. Appellants' argument in their Jurisdictional Statement that the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution, is, however, directed toward Appellants' belief that the Commission decision, as affirmed by the district court, is violative of the requirements of Section 20(11) of the Act and of

the common law applicable to common carriers as well as of Sections 2 and 3 of the Act. Appellees' motion to affirm, therefore, will be in response to Appellants' arguments on these points.

A. There Has Been No Change in Commission Policy

Appellants urge on this Court that the majority of the Commission has in some manner changed a long-standing rule of the Commission and relieved common carriers of an alleged duty to weigh at its origin point carload freight tendered to the carrier by the shipper. Nothing in Section 20(11) of the Act imposes any such duty upon the railroads, that section merely requiring carriers to issue "a receipt or bill of lading" for any shipment tendered to it and imposing liability upon the carriers for loss, damage or injury to the property caused by any of the carriers involved in the transportation of the property. Appellants cite no case (neither judicial or administrative) in which it is held that the carriers must provide, free of charge, a weight to the shipper at point of origin for purposes of filing freight loss and damage claims. Appellees submit there are no cases and there is no such duty upon Appellees.

The Commission, in its report on further consideration of this case, dealt specifically with this question and held that there is nothing in the Act which requires a railroad to weigh a shipment at a particular time or in a particular way, neither is there a requirement that the railroads provide a weighing service as

part of the line-haul rate, other than for the purpose of computing freight charges (Jur. Stmt. App. C, p. 12a). In so holding, the Commission specifically considered the case relied upon by Appellants as establishing the "rule" that freight must be weighed at the point of origin or as near thereto as practicable, *In Re Weighing of Freight By Carrier,* 28 I.C.C. 7, 36 (1913). In that case, the Commission in no manner established the hard and fast rule, merely indicating that freight *ordinarily* should be weighed near the point of origin. Further, the issues in that case related solely to the use of weights for purposes of determining freight charges, and not for use in filing freight loss and damage claims (Jur. Stmt., p. 9). Appellants make no claim that the rule is in any respect unlawful because weighing for purposes of determining freight charges is not done at or near the point of origin.

As the Commission said in *Anaconda Copper Mining Co. Terminal Service,* 264 I.C.C. 103; 266 I.C.C. 387, 391: "It is of course the duty of carriers to weigh shipments to determine freight charges." The tariff item at issue here in no way diminishes that duty and Appellants do not contend that it does. Appellants' contention is that they are entitled to a free origin weigh so that they may file freight loss and damage claims against the carrier when the origin and destination weights do not agree. The Commission gave full consideration to this contention and held (Jur. Stmt., p. 13a) that "the railroads' only duty to weigh the freight is for the purpose of determining the proper freight charges." This is a duty to which Appellees

have been subject for many years and it is a duty which is not abrogated by the tariff item in question. The item is therefore, as the Commission held, fully consistent and entirely in accordance with past railroad weighing practices.

In affirming its prior decision, the Commission very carefully drew a distinction between a weighing service at origin for the benefit of the shipper and a weighing service at origin in accordance with the carriers' duty to determine freight charges. The Commission quite properly noted that there is no evidence that Appellees were performing origin weighing as a service for the benefit of the shipper, the sole purpose of weighing at or near origin being to determine freight charges in accordance with the carriers above-described duty. As the Commission correctly noted, any benefits which Appellants derived from the origin weighing were merely fortuitous and not a service to which Appellants are entitled as a matter of right.

Appellants argue that under Section 20(11) of the Act, Appellees are required to issue a receipt for the goods shipped and that such receipt must include the weight of the goods being shipped. The cases relied upon by Appellants do not support Appellants' argument. The issue involved here was not considered by the Commission in *Rules, Regulations and Practices of Regulated Carriers With Respect to the Processing of Loss and Damage Claims,* 340 I.C.C. 515 (1972), the Commission merely noting, at 584, that the bill of lading is a receipt for the goods shipped. Nothing in that decision relates to the contention of Appellants that

such receipt must contain information as to the weight of the goods being shipped.

Appellants argue that Appellees are insurers of the goods received by them for transportation and that they may not limit their liability with respect to those goods and that the effect of the item in question is to limit such liability because Appellants no longer have an origin weight against which they can compare the destination weight for purposes of filing freight claims. This argument was adequately dealt with by the Commission in its report on further consideration. There the Commission noted that there is no historical precedent requiring that shipments be weighed at origin in order to determine freight charges or that the actual weight must be inserted in the bill of lading. The Commission relied on *Baird* v. *St. Louis, I.M. & S. Ry. Co.,* 41 F. 592, 594 (E.D. Ark. 1890), in which the court stated:

> "Bills of lading are frequently issued before the weight of the freight is known. It is not necessary to the issuance of a bill of lading that it should be known."

Appellants urge the *Baird* case is inapplicable to the situation here, since it was decided before the Carmack Amendment of 1906. This fact does not distinguish the case, however, for, as the Commission noted in *Loss and Damage, supra,* at 522, the purpose of the Carmack Amendment and the second Cummins Amendment thereto was to restore the law of full liability as it existed prior to the Carmack Amendment of 1906.

Thus, the law extant at the time of *Baird* was the common law of carrier liability, the precise law of carrier liability which the Carmack Amendment was designed to restore. As the Commission noted in *Loss and Damage, supra,* "the law of full liability as it existed prior to the Carmack Amendment in 1906 has been in effect, . . ." since the Second Cummins amendment (*Ibid*).

Subsequent to the enactment of the Carmack Amendment, the United States Court of Appeals for the District of Columbia in *United States* v. *Interstate Commerce Comm'n,* 73 F. 2d 948 (Ct. App. D.C. 1934), *cert. denied,* 294 U. S. 712 (1935), held:

> "But there is nothing in the act itself, and nothing in the published tariff—certainly nothing which may be said to be beyond dispute—which, as we think, makes it the duty of the railroad company to ascertain the weight of the shipment in any particular manner."

In this case the court had under review a Commission decision approving a tariff item providing for alternate means of determining the weight of cattle for purposes of assessing freight charges. The Commission found the tariff item to be lawful. The court, in upholding the Commission's decision and thus the lawfulness of the tariff item in question, stated that the carriers had a duty to furnish all necessary service incident to the carriage, including the ascertainment in some way of the accurate weight of the shipment, since the assessment of transportation charges is based on the weight of the cattle (*Id.* at 951). The court then

went on to make the statement quoted above to the effect that nothing in the Interstate Commerce Act requires the railroad to ascertain the weight of the shipment in any particular manner. Here the consignee's position was that the cattle were required to be weighed at destination in the stockyard pens just prior to delivery to the consignee. Thus the consignee desired the very thing Appellants here object to; that is, destination weighing of commodities shipped on the railroad. Under the tariff the carrier had the option of weighing for the assessment of freight charges by use of track scales or by destination hoof weights where available. The track scales were used in this case and it was the use of such track scales that was the source of objection by the consignee. The court approved the tariff providing for alternative means of weighing the shipment.

Appellants' contention that the carriers are seeking to exempt themselves from their liability for loss and damage to shipments is similarly without merit. As the Commission noted in its report on further consideration, there is no evidence to suggest that there is any subversion of a shipper's ability to settle its loss and damage claims. As the Commission stated: "Moreover, there is nothing in the tariff at issue to prevent shippers who suspect that there may be losses in transit from receiving a weighing at or near point of origin." (Jur. Stmt. App. C, p. 17a).

B. The Tariff Is Not Discriminatory

Appellants' contentions that the tariff item at issue here is discriminatory ignores the sole purpose for which weights are determined, that is, for the assessment of freight charges. The weighing is not for the benefit of the shipper, and it is the circumstances of the particular shipper involved (which appellees cannot control) that determine whether a weight will be determined at or near origin or at a destination point. There is no discrimination here for the tariff item is available to all. Since the weighing is not for the benefit of the shippers but is solely for determination of freight charges, the shipper does not "receive" a weighing either at origin or destination. As the Commission noted, any benefits which shippers derived from origin weighing were merely incidental and fortuitous (*Ibid*). The Administrative Law Judge correctly held that regardless of where weights are taken, shippers pay the same charges for like or contemporaneous services, since the shipper pays no charge for the weighing to determine freight charges.

From the foregoing, it is apparent that the questions presented here have been thoroughly and adequately considered at all administrative levels in the Interstate Commerce Commission. As this Court is well aware, the scope of judicial review of Commission decisions is quite narrow and is limited to a consideration of whether the decision of the Commission is based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Bowman Transportation, Inc.* v. *Arkansas Best Freight System,*

Inc., 419 U. S. 281, 285 (1974). The lower court, on consideration of the report and order of the Commission on further consideration and of the standard of review, stated in the *Bowman* case, affirmed the decision of the Commission and dismissed Appellant's complaint.

Thus it is that the questions involved in this case have been considered at length at the agency level by an Administrative Law Judge, by the Commission's Review Board No. 4, by Division 2 of the Commission, by the Commission itself on petition for reconsideration and on petition for a finding of general transportation importance, by the entire Commission again on remand by the district court for further consideration and by the district court below. All the questions raised by Appellants have been considered and at each level of consideration the contentions raised by Appellants have been found to be without merit. In view of the extensive consideration given the questions raised by Appellants, it is clear that no useful purpose can be served by further plenary consideration, with briefs on the merits and oral argument, by this Court.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the United States District Court for the District of Columbia in Civil Action No. 2090-72, *Institute of Scrap Iron and Steel, Inc.* v. *The United States of America and Interstate Commerce Commission,* affirming the decision of the Commission on further consideration. It is manifest that the questions on

which the decision of the cause depend are so unsubstantial as not to need further argument.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

INSTITUTE OF SCRAP IRON AND STEEL, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the opinion and order of a three-judge court (J.S. App. D, 22a-26a) dismissing an action to set aside an order of the Interstate Commerce Commission (J.S. App. C, 8a-21a). The Commission's order found a tariff rule published by certain rail carriers to be just and reasonable.

The tariff rule in dispute is Item 415 (Rule 4) of Freight Tariff S-215-K (J.S. App. F) published by the Southern Freight Association rail carriers.[1] Basically, the rule pro-

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[1]The Southern Territory, in which the tariff is applicable, includes points in the states of Alabama, Florida, Georgia, Indiana (Evansville), Kentucky, Louisiana (East of the Mississippi River), Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

vides that where there is in effect a weight destination agreement,[2] freight charges will be based on the weight as determined at destination. In all other cases freight charges will be based on the weight as determined at the point of origin of the shipment. There is no additional charge for weighing for purposes of determining freight charges, whether made at origin or destination; rather, it is part of the line-haul charge. Where freight charges are based on destination weights, a shipper may obtain an origin weighing, but such an additional weighing results in a separate, additional charge.

In a complaint filed with the Commission in 1969, the Institute of Scrap Iron and Steel, on behalf of several members, alleged that this tariff rule permitting carriers to assess freight charges based on weights obtained at destination rather than at origin violated several sections of the Interstate Commerce Act.[3] Following receipt of evidence, the Administrative Law Judge found the rule not to be unjust or unreasonable or otherwise unlawful, and dismissed the complaint. In so finding, he observed that the complaining shippers did not contend they are entitled to free weighing at both origin and destination; rather their objective "appears to be to secure an origin weighing at no cost, despite the authorized destination weighing provided as part of the line-haul rate" (341 I.C.C. 771, 776). But the Administrative Law Judge found that since "[t]he requested

[2]A weight destination agreement is an agreement between a carrier and a consignee whereby the consignee undertakes the weighing of a shipment at destination (J.S. App. 5a).

[3]The sections allegedly violated were Sections 1(4), 1(5), 1(6), 2, 3(1), 6(3), 6(6), and 20(11) of the Act (49 U.S.C. 1(4), 1(5), 1(6), 2, 3(1), 6(3), 6(6), and 20(11)).

origin weight would serve the shipper's purposes other than to determine the freight charge" (*ibid.*) the cost of providing the additional weighing should not be borne by the carriers, because their statutory duty to weigh shipments is solely for the purpose of determining correct freight charges. The Administrative Law Judge's decision was subsequently affirmed by the Commission.

On review, the district court, without reaching the merits of plaintiffs' contentions, remanded the proceeding to the Commission for further articulation of its reasons for permitting what the district court perceived to be the conversion of "origin weighing, a service previously performed as part of the line-haul rate, into an 'accessorial' service when destination weight agreements are employed" (J.S. App. 5a).

On remand the Commission observed that if the "past railroad practice had been to include weighing at origin for the shipper's benefit, then such weighing service could properly be held to have been performed as an accessorial service", and a separate charge could not be approved for such an accessorial service unless the rail carriers could support it with substantial evidence (J.S. App. 14). However, after reviewing the record, the Commission determined that there was no evidence "that the railroads had ever held themselves out to perform a weighing service at origin *for the benefit of the shipper* as part of the line-haul rate" (*ibid.*) or "were performing origin weighing as an accessorial service (i.e., a service for the shipper's benefit other than to determine freight charges) prior to 1969 when the assailed item became effective * * *" (*id.* at 15a).

The Commission concluded that "there is nothing in the Interstate Commerce Act which requires a railroad to weigh a shipment at a particular time or in a particular way. Nor is there any requirement that the railroads are

obligated to provide a weighing service as part of the line-haul rate other than for the purpose of computing freight charges" (*id.* at 12a). Finally, the Commission found that the carriers had indicated the existence of several economic and operational benefits to be gained from weighing the shipment at destination rather than interrupting the movement of a train to remove cars in order to obtain the weight while en route (*id.* at 13a).

Subsequently, the district court, noting that "if the conclusions of the Commission have a rational basis, it is not for the Court to quarrel with them" (J.S. App. 23a), found that the Commission had adequately explained the reasons for its decision. The district court further concluded, upon reviewing the Commission's findings, that "there has been no change of longstanding 'policy.' Instead, a practice from which shippers derived incidental and fortuitous benefits has been changed" (*id.* at 25a). Thus, based "upon consideration of the Report and the standard of review stated in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*," 419 U.S. 281, the district court dismissed the complaint (J.S. App. 25a-26a).

ARGUMENT

The decision below is correct and does not warrant plenary review by this Court.

Appellants' sole contention[4] is that the tariff rule violates Section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11), regarding the liability of carriers for loss

[4]Although in the district court appellants contended that the tariff rule was discriminatory, and although the first question presented in the Jurisdictional Statement (J.S. 3) refers to Sections 1(5), 1(6), 2, and 3(1) of the Act, appellants do not discuss this issue and apparently have abandoned it in this Court. In any event, the tariff rule is not discriminatory. Its provisions are applicable to all shippers in the relevant geographic area, and all shippers receive a weighing at no additional charge for purposes of determining freight charges.

of shipments. Appellants assert (J.S. 7-8) that Section 20(11)'s requirement that a carrier "issue a receipt or bill of lading" for property shipped imposes an obligation on carriers to provide origin weighing as part of the line-haul charge. But the Commission properly found that there is no historical precedent requiring "that the actual weight must be inserted in the bill of lading" (J.S. App. 17a) (see, *e.g.*, *Baird* v. *St. Louis, I.M. & S. Ry. Co.*, 41 Fed. 592, 594 (C. Ct. E.D. Ark.)) and nothing in either the language of Section 20(11) or its legislative history suggests that Congress intended to require a carrier to include origin weighing as part of the line-haul charge.

The tariff rule does not, of course, preclude a shipper from obtaining an origin weighing. It merely requires the shipper to pay an additional charge in cases where there is a destination weight agreement in effect.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-28

INSTITUTE OF SCRAP IRON AND STEEL, INC., et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

and

THE INTERSTATE COMMERCE COMMISSION,

Appellees,

and

LOUISVILLE AND NASHVILLE RAILROAD CO., et al.,

Railroad Appellees,

On Appeal From The United States District Court For The District Of Columbia

APPELLANTS' BRIEF OPPOSING MOTIONS TO AFFIRM

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APPELLANTS' BRIEF OPPOSING MOTIONS TO AFFIRM

Pursuant to Rule 16(4) of the Rules of this Court, Appellants file this brief in opposition to Appellees' motions to affirm the decision below. The issues raised by this appeal are indeed substantial and merit a full hearing by the Supreme Court. What is at stake here is perhaps the most fundamental issue of transportation law, not a

narrow procedural technicality as was involved in *Bowman Transportation, Inc.* v. *Arkansas Best Freight System,* 419 U.S. 281. The major issue in this proceeding is whether a shipper is entitled to a receipt from a common carrier showing the quantity of goods tendered to the carrier for transport.

The unambiguous wording of 49 U.S.C. 20(11) requires the railroads to issue a "receipt or bill of lading" to the shipper upon delivery of the goods to the carrier for transportation.

> "The Carmack Amendment requires the carrier receiving property for transportation between points in different states to issue a receipt or bill of lading therefor and makes the carrier liable to the lawful holder thereof for any loss, damage or injury to such property." *Southern Pacific Co.* v. *Stewart,* 245 U.S. 359, 362 (1917)

Appellees admit that receipts or bills of lading must be issued to shippers but deny that the weight or quantity must be stated thereon. However, this Court held that a bill of lading is both a receipt for the quantity of goods shipped and a contract for shipment of the goods.

> "Such an instrument is twofold in its character; that is, it is a receipt as to the *quantity* and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Beyond all doubt a bill of lading, in the usual form, is a receipt for the *quantity of goods shipped* and a promise to transport and deliver same as therein stipulated." *The Delware,* 81 U.S. 579, 601, 14 Wall 579, 20 L.Ed. 779 (1871) (Emphasis added)

In *Schalb* v. *Erie R. Co.,* 293 N.Y.S. 842, 845, 161 Misc. 743 (1937), the Court held:

> "One of the first functions of a bill of lading, as stated above, is to describe the *quantity,* condition, and quality of the goods shipped." (Emphasis added)

Not only do Section 20(11) and the common law require the issuance to all shippers of bills of lading or receipts indicating the quantity of goods tendered for transportation, but issuing receipts and bills of lading showing quantities to some shippers and not to others is discriminatory in violation of Sections 2 and 3 of Title 49. This is because the shipper who is not furnished a bill of lading showing the origin weight must pay an extra charge for origin weighing service, so that he, like the competing shipper whose bill of lading includes the origin weight, will be able to prove his case if a loss in transit occurs. In the very competitive scrap iron market the shipper who must bear an extra expense for origin weighing for each carload suffers discrimination vis a' vis the scrap shipper whose cars are weighed at origin without extra charge.

The cases cited by Appellees are distinguishable. The requirements of Section 20(11) were not at issue in *Anaconda Copper Mining Co. Terminal Service,* 264 I.C.C. 103; 266 I.C.C. 387; *Baird* v. *St. Louis, I. M. & S. Ry. Co.,* 41 F. 592 (E.D. Ark. 1890), or *United States* v. *Interstate Commerce Commission,* 73 F.2d 948 (Ct. App. D.C. 1934), cert. den., 294 U.S. 712 (1935).

Prior to publication of the assailed tariff the standard practice in the railroad industry was for shipments to be weighed at point of origin or as near thereto as practicable. *In Re Weighing of Freight by Carrier,* 28 I.C.C. 7, 36 (1913). Elimination of origin weighing without extra charge violates the Interstate Commerce Commission's rule that:

> ". . . it will not allow a separate charge for an accessorial service previously performed as part of the line-

haul rates without substantial evidence that such an additional charge is justified measured against the overall reasonableness of the increased line-haul rate resulting therefrom." *Wichita Board of Trade* v. *U.S.*, 352 F. Supp. 365, 368 (D. Kansas) affirmed in part, reversed in part sub nom., *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade,* 412 U.S. 800 (1973).

The rationale for this rule was set forth by Justice Marshall of this Court:

> "The explicit purpose of the rule in this situation is to guarantee that shippers receiving the same service they had previously received to not pay an unreasonable amount . . . [citations omitted]. The rule, in this regard, is that the railroads must demonstrate both that the proposed charge is reasonable in light of the costs of the separate service, and that the total charge for line haul plus the separate service is reasonable." *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade,* 412 U.S. 800, 811 (1973).

The assailed tariff now requires the shipper to pay an extra charge for weighing at origin which was formerly provided as a part of the line-haul freight rate. The railroads have not lowered freight rates to take account of this dimunition of service. Neither in the Orders of the Commission nor in the Opinions of the Court below was it stated that the railroads demonstrated that the charge for origin weighing is reasonable or that the total charge for line-haul plus origin weighing is reasonable.

If a shipper has no receipt or bill of lading showing the quantity of scrap iron delivered to the carrier at origin, there is no specific basis to prove losses in transit which might have occurred and to collect for such losses from the railroad. By eliminating weighing at origin the

carriers seek to limit their liability for losses. This amounts to a rate increase although the carriers offered no evidence before the Commisison to justify higher rates.

> "A rule narrowing the carriers' previously acknowledged liability for loss and damage is akin to an increased rate." *Northern Potato Traffic Asso.* v. *C. & N.W. Ry. Co.,* 53 I.C.C. 100, 101, 102.

Obviously, the carriers seek to reduce their payments to shippers for losses of goods transported. However, losses in transit are the fault of the railroads, not shippers.

If the railroads prevail in limiting or extinguishing their responsibility to provide shippers with a receipt or bill of lading showing the quantity of goods tendered for transport, it seems reasonable to assume that these common carriers will seek to eliminate other common law and statutory transportation duties.

Although an origin weight might not be required by shippers of every commodity, it is vital for scrap consignors. Commissioner O'Neal stated in his dissenting opinion (Jurisdictional Statement, p. 19a):

> "While a weighing may not be necessary to determine exactly what the shipper tendered and the carrier received with respect to some commodities, it certainly seems necessary with respect to scrap. The commodity cannot be inventoried by unit count, and it cannot be measured on the basis of volume. Therefore, although origin weighing may be unnecessary to the issuance of a receipt for some commodities, it seems imperative with respect to scrap."

The Commission's decision upholding a tariff that is violative of the plain wording of Section 20 (11) 49 U.S.C., as well as the common law, is erroneous and probable jurisdiction should be noted for the reasons stated herein and in the Jurisdictional Statement.

"The delegation to the Commission is not, of course, unbounded, and it is the duty of a reviewing court to determine whether the course followed by the Commission is consistent with its mandate from Congress." *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade,* 412 U.S. 800, 806 (1973).

Respectfully submitted,

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